UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER, Plaintiff - Appellant, v. DANNY BURLS, et. al, Defendant - Appellee,	No. 18-2181 Appeal from the United States District Court for the Eastern District of Arkansas (No. 5:17-CV-79 JLH-BD)

PETITION FOR REHEARING BY PANEL AND REHEARING EN BANC

Pursuant to Federal Rules of Appellate Procedure 35 and 40, Appellant Charles Hamner seeks rehearing and rehearing en banc.

Rule 35(b) Statement in Support of Rehearing En Banc

The majority opinion undermines the uniformity of this Court's jurisprudence, conflicts with the authoritative decisions of every other circuit, and raises an independent question of exceptional importance.

1. On review of a 12(b)(6) dismissal, the majority held that prison officials were entitled to qualified immunity, deeming it "debat[able]" whether "clearly established law" permitted prison officials to subject a "seriously mentally ill"

prisoner to prolonged solitary confinement without due process.[1] Op.11. The majority did not consider whether defendants' indefensible conduct violated the Constitution.

Defendants had not contended that the district court or circuit court should dispose of Hamner's complaint on that basis, arguing instead that he had not stated a claim. Nonetheless, the panel sua sponte raised and the majority affirmed on the basis of an affirmative defense that defendants had elected not to assert below, brief on appeal, or raise at oral argument.

The majority's extraordinary maneuver violates *Gomez v. Toledo*, 446 U.S. 635 (1980) and *Wood v. Milyard*, 566 U.S. 463 (2012), creates an intra-circuit conflict with *Angarita v. St. Louis Cty.*, 981 F.2d 1537 (8th Cir. 1992), and splits with every other circuit court. *See infra* at 12-13. This authority uniformly establishes that the panel was prohibited from immediately reviewing qualified immunity because defendants could have but did not claim entitlement to it in the district court. The majority did not acknowledge this contrary authority or attempt to distinguish it.

The majority reasoned that abstaining would be inefficient because defendants would ultimately assert their entitlement to qualified immunity on remand in a

[1] Administrative segregation "is better known [as] solitary confinement," *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring), so Hamner uses that terminology.

motion for summary judgment. Op.6. So they will. But the pursuit of administrative efficiency cannot confer authority here—a reviewing court cannot revive waived affirmative defenses, and may "resurrect" forfeited affirmative defenses only under "extraordinary circumstances" wholly absent. *Wood*, 566 U.S. at 471 & n.5. This Court can consider defendants' entitlement to qualified immunity if this case returns to it after summary judgment.

The majority's tactic is particularly ill-fitting here. For nearly seven months, officials subjected a mentally ill prisoner to solitary confinement. Op.2 There, he decompensated, experiencing "hallucinations, nightmares, restlessness, anxiety and panic attacks, and felt a risk of irreparable emotional damage or suicide." Op.3 (internal quotations omitted). Isolation for seven months is long enough to inflict permanent damage; under the majority's approach, though, it is too short to obtain review of the constitutional prong of the qualified immunity analysis. *See Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009).

Recently, Judge Grasz condemned the order of operations that *Pearson* permits but does not command, noting that it "stunt[s] the development of constitutional law" by "perpetuat[ing] the very state of affairs used to defeat [a plaintiff's] attempt to assert [her] constitutional rights" through encouraging "default[] to the 'not clearly established' mantra." *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting). Here, the majority did much

more than that—it effectively transformed an affirmative defense into a jurisdictional element.

2. Judge Erickson's "reluctant[]" concurrence recognized "the detrimental and devastating effects that placement in administrative segregation has on the human psyche," criticized this Court's "reluctance to meaningfully address the significant hardship imposed on inmates placed in isolation," and called for "revers[al] [of] the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications." Op.13-15 (Erickson, J., concurring).

Much has been learned about the harmful effects of solitary confinement—particularly on those with mental illness—in recent years. *See* Brief of Amici Curiae. That scientific consensus has informed subsequent judicial and societal opinions. *See infra* at 15-19. These "evolving standards of decency," *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), are not only relevant to the Eighth Amendment—Hamner's Fourteenth Amendment claim requires weighing the "hardship" of solitary confinement against normal prison life. Op.14-15 (Erickson, J., concurring).

BACKGROUND

A. Factual Background

Hamner suffers from "borderline personality disorder, posttraumatic stress disorder, antisocial personality disorder, anxiety, and depression." Op.2. Nonetheless, he maintained a perfect disciplinary record. Appellants.Br.4. In 2015,

after Hamner "alerted prison authorities to a potential attack by another inmate against a prison guard," defendants threw him in solitary. Op.2.

There, Hamner was behind a solid door for twenty-three hours a day during the week. Appellants.Br.5; *see also* Op.3. If he consented to two invasive strip searches, Hamner could exercise alone for one hour. *Id*. On weekends, Hamner was confined to his cell for all 48 hours. *Id*. Throughout, he "rarely [had] any human contact." Op.3. Making his isolation near-complete, Hamner could not watch television and his often-lightless cell "ma[de] it hard to see or read anything." *Id*.

Solitary wreaked havoc. Op.3. That was predictable given the "known" effects of isolation. Op.14-15 (Erickson, J., concurring). Even so, Hamner had "no meaningful opportunity to challenge his placement in isolation." Op.14 (Erickson, J., concurring); *see also* Op.2.

B. Procedural History

In 2017, Hamner filed a pro se civil rights complaint, asserting defendants violated the Fourteenth Amendment by subjecting him to solitary without due process. Op.3. He also complained of retaliation. *Id*. The district court screened Hamner's complaint prior to service, and concluded that seven months of isolation

was too brief to invoke a liberty interest, but permitted the retaliation count to proceed. AA71-72; Appellants.Br.3; Op.4.

Defendants moved to dismiss the retaliation claim, arguing that they were "entitled to qualified immunity in their individual capacities as to plaintiff's retaliation claim." Dkt17 at 5. The district court denied the motion. Dkt20 at 5; Dkt22.

Hamner then filed an amended complaint expanding upon his due process claim. Op.4. He also raised two new claims, each under the Eighth Amendment—one alleging defendants subjected him to unconstitutional conditions by holding him in solitary despite his mental illness; the other alleging deliberate indifference to serious medical needs because solitary interfered with necessary mental health care. Op.4; Appellants.Br.16-17.

Defendants moved to dismiss a second time. They argued that neither Eighth Amendment count stated a claim and urged the court to "ignore" the amended due process claim. Dkt38 at 1-5. At no point did defendants raise qualified immunity as a defense to these claims.

The district court granted defendants' 12(b)(6) motion to dismiss. It reprised its due process ruling and concluded that Hamner failed to state a claim for inadequate medical care. AA108-10. The district court considered it "unnecessary" to independently review Hamner's conditions claim. AA110 n.1. Nor did it consider

whether Hamner's claims could have been disposed of on the un-asserted basis of qualified immunity.

On appeal, the parties took divergent views of the merits, but neither raised qualified immunity. At oral argument, however, the panel sua sponte raised the affirmative defense. After argument, supplemental briefs "address[ing] whether any or all of the district court's judgment should be affirmed based on qualified immunity" were ordered. Op.5.

Because defendants asserted they were entitled to qualified immunity from the retaliation claim, but not the Eighth or Fourteenth Amendment claims, Hamner argued that *Wood*, *Angarita*, and out-of-circuit authority established that these claims had been waived (or, at least, forfeited) for purposes of the pleading stage. Supp.Br.2-8. Hamner acknowledged that defendants would later be entitled to move for summary judgment on the basis of qualified immunity.[2] Supp.Br.1-3.

Defendants argued in response that the panel was entitled to raise qualified immunity sua sponte and it was efficient to review it immediately.

[2] In the alternative, Hamner both identified cases providing notice to defendants and argued under the rule of *Hope v. Pelzer*, 536 U.S. 730 (2002), that their violations were so "obvious" there was no need to "consult a casebook." Supp.Br.24; Supp.Reply.Br.7 n.4.

Appellee.Supp.Br.1-5, 7-14. Even then, however, they did not assert qualified immunity from Hamner's deliberate indifference claim.[3] Supp.Reply.Br.10-11.

Although acknowledging that defendants had not raised qualified immunity below or on appeal, Op.6, the majority did not distinguish (or cite) the authoritative precedent that Hamner contended controlled. Immediate appellate review was efficient, the majority reasoned, since without it "the case inevitably would return to us for a decision on that point in a second appeal." *Id*. Also playing a role was the majority's mistaken belief that Hamner's equitable claims were live when defendants filed their second motion to dismiss, a factor purportedly excusing defendants' failure to assert qualified immunity from the Eighth and Fourteenth Amendment claims.[4] *Id*.

The majority acknowledged that scientific knowledge regarding the "negative effects of segregation may influence … future court decisions" but declined to consider whether defendants' egregious conduct was unconstitutional. Op.5-6. Reviewing only the "clearly established" prong was preferable, the majority

[3] Nor did they contest Hamner's argument that this was an obvious case. Supp.Reply. Br.7 n.4.

[4] In reality, defendants argued from the start that Hamner's equitable claims were mooted by a prison transfer that occurred before he filed his original complaint. Dkt17 at 8-9.

explained, because reaching the constitutional issue risked "turn[ing] a small case into a large one." *Id.*

Judge Erickson "reluctantly" concurred but criticized the majority's unwillingness to examine whether defendants' conduct was constitutional. Op.13-15 (Erickson, J., concurring). In light of evolving scientific knowledge, he argued that "the time has come to consider the literature and reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications." Op.15 (Erickson, J., concurring).

ARGUMENT

I. The Majority Opinion Conflicts With Supreme Court and Eighth Circuit Precedent, Splits With Every Other Circuit, and Dramatically Extends The Doctrine of Qualified Immunity.

Prior to the decision in this case, the law in this circuit was clear: where—as here—defendants had the opportunity to but did not assert qualified immunity in the district court, the court of appeals could not revive the affirmative defense, sua sponte or otherwise. That straightforward rule is compelled by *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), which held that qualified immunity is an affirmative defense, and both *Wood v. Milyard*, 566 U.S. 463 (2012) and *Angarita v. St. Louis Cty.*, 981 F.2d 1537 (8th Cir. 1992), which establish the ground rules for reviewing waived and forfeited affirmative defenses.

Wood "made clear" that federal courts totally lack "the authority" to review

waived defenses. *Id*. at 471 n.5. And even defenses that are merely forfeited, not waived, still "cannot be asserted on appeal" except in "exceptional cases," such as habeas corpus claims where values of comity, finality, and federalism are at their apex.[5] *Id*. at 470-72. Even this limited potential to revive forfeited defenses has been widely criticized. *E.g.*, *Day v. McDonough*, 547 U.S. 198, 212 (2006) (Scalia, J., dissenting, joined by Thomas, J. and Breyer, J.) (refusing to "join this novel presumption *against* applying the Civil Rules" that have long prohibited federal courts from *sua sponte* considering forfeited defenses).

In *Angarita*, other than listing it in their answer to the complaint, defendants never pursued qualified immunity in the district court. 981 F.2d 1548. On appeal, they argued the defense for the first time. *Id*. This Court refused to consider qualified immunity, explaining that, "[b]y failing to raise [qualified immunity] with the district court, appellants failed to preserve this issue for appeal." *Id*.

Here, because defendants asserted qualified immunity with respect to one claim but not others, they knowingly waived it below, *Wood*, 566 U.S. at 474, depriving the panel of any "authority" to review it. Even construed erroneously as mere forfeiture, review was prohibited by *Wood* and *Angarita*—the panel identified

[5] A waived defense is "knowingly and intelligently relinquished." 566 U.S. at 470 n.4. A forfeited defense has been inadvertently abandoned. *Id*.

no "extraordinary circumstance" authorizing review. Convenience is not enough. *See id*. at 470-72 & n. 5.

Notwithstanding this controlling authority, which the panel did not cite or distinguish, the majority effectively transformed qualified immunity from an affirmative defense into a jurisdictional element.[6] To support this unprecedented approach, the majority cited *Story v. Foote*, 782 F.3d 968 (8th Cir. 2015), *Jacobson v. McCormick*, 763 F.3d 914 (8th Cir. 2014), and *Graves v. City of Coeur d'Alene*, 339 F.3d 828 (9th Cir. 2003). *See* Op.6.

In *Story*, the majority sua sponte raised the affirmative defense of qualified immunity on review of a *pre-service* screening stage dismissal, 782 F.3d at 969-70, a procedural history that renders the case inapposite. Defendants in that case did not appear below, *id*. at 969, and therefore, unlike here, had no opportunity to assert the affirmative defense of qualified immunity. Even so, the procedure provoked a vigorous dissent. 782 F.3d at 975 (Bye, J., dissenting) ("The majority does not cite, and I have been unable to find, any cases where the Eighth Circuit *sua sponte* raised the affirmative defense of qualified immunity.").

Jacobson is not a green light either. There, defendants asserted qualified immunity below in answering the counts pending on appeal, but not in subsequent

[6] Even when directed to submit supplemental briefing, defendants did not assert qualified immunity from Hamner's deliberate indifference claim; *the majority granted it to them anyway*. Op.7-9.

dispositive briefing. 763 F.3d at 916. The panel raised qualified immunity and issued a supplemental briefing order, asking: "should this Court address … qualified immunity?" *Id*. The *plaintiff* responded in the affirmative, arguing the appellate court "must address" qualified immunity. *Id*. at 916-17. The panel considered dispositive both defendants' assertion of the defense below and plaintiff's position on appeal. *Id*. Here, in contrast, defendants elected not to assert immunity below and Hamner argued that reviving the waived, pleading-stage version of the affirmative defense was prohibited. Supp.Br.2-10; Supp.Reply.Br.1-5. The *Jacobson* court would have considered that the end of the story.

As final authority, the majority cited *Graves v. City of Coeur d'Alene*, 339 F.3d 828 (9th Cir. 2003). There, a panel raised qualified immunity where defendants had asserted it below in an answer to the claims pending on appeal and the "record ha[d] been fully developed below" through a trial. *Id*. at 845 n.23.

Here, in stark contrast to *Story*, *Jacobson*, and *Graves*, defendants had every opportunity to assert qualified immunity from Hamner's Eighth and Fourteenth Amendment claims but did not. The cited authority, far from authorizing the majority's procedural mechanism, emphasizes its extraordinary nature.

The majority's break with *Gomez*, *Wood*, and *Angarita* does not find support elsewhere. To counsel's knowledge, no other appellate court has sua sponte invoked qualified immunity where—as here—defendants had an opportunity to assert it in

the district court but did not. Refusing to proceed as the majority did, however, has been commonplace for decades. *See Montoya v. Vigil*, 898 F.3d 1056, 1064-65 (10th Cir. 2018); *Robinson v. Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016); *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010); *Bines v. Kulaylat*, 215 F.3d 381, 385 (3d Cir. 2000); *Calabretta v. Floyd*, 189 F.3d 808, 818 (9th Cir. 1999); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997); *Kelly v. Foti*, 77 F.3d 819, 822-23 (5th Cir. 1996); *Hill v. City of N.Y.*, 45 F.3d 653, 663 (2d Cir. 1995); *Moore v. Morgan*, 922 F.2d 1553, 1557-58 (11th Cir. 1991); *Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991); *DeMallory v. Cullen*, 855 F.2d 442, 449 n.4 (7th Cir. 1988).

But the majority did more than defy the Supreme Court, create an intra-circuit conflict, and split with every other circuit. Its opinion also reflects a "freewheeling policy choice," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring), to dramatically enlarge the scope of qualified immunity despite recent criticism of "the kudzu-like creep of the modern [qualified] immunity regime." *Zadeh v. Robinson*, 902 F.3d 483, 498-99 (5th Cir. 2018) (Willett, J., concurring). That criticism is justified.

The order of operations that *Pearson* permits but does not command "stunt[s] the development of constitutional law" by "perpetuat[ing] the very state of affairs used to defeat [Hamner's] attempt to assert [his] constitutional rights." *Kelsay*, 933

F.3d at 987 (en banc) (Grasz, J., dissenting); *see also Zadeh*, 902 F.3d at 499 (Willett, J., concurring) (describing that order of operations as an "Escherian Stairwell" where "Section 1983 meets Catch-22"). On the flipside, there is little downside: qualified immunity is not required to insulate from the chill of financial ruin. *E.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 888, 890 (2014) (indemnification guarantees that law enforcement officers almost never pay out-of-pocket—indeed, only .02% of the time). And where defendants had 203 days to reflect, qualified immunity does not serve the value it might where a split-second decision is called for.

"There is a better way." *Kelsay*, 933 F.3d at 987 (en banc) (Grasz, J., dissenting). This Court "should … at every reasonable opportunity [] address the constitutional violations prong of qualified immunity analysis, rather than defaulting to the 'not clearly established' mantra." *Id*. Such an approach is particularly compelling in cases like this because challenges to solitary confinement may "not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 555 U.S. at 236.

This Court is bound to apply qualified immunity at the appropriate time. But it is equally bound not to push the limits of the doctrine into conflict with controlling authority.

II. This Court Should Hold That The Prolonged Solitary Confinement of Mentally Ill Prisoners is "A Significant Hardship."

The majority acknowledged that "[s]cholarly literature about negative effects of segregation may influence . . . future court decisions." Op.11. Judge Erickson went further, calling upon this Court to immediately stop "ignor[ing] reality" and "reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications." Op.15 (Erickson, J., concurring). It is time.

Although the Supreme Court first recognized the destructive effects of solitary in 1890, *In re Medley*, 134 U.S. 160, 168 (1890), it did not call in earnest for constitutional scrutiny until the twenty-first century. *See Wilkinson v. Austin*, 549 U.S. 209, 214, 223 (2005) (describing solitary unit as "synonymous with extreme isolation," holding that prisoners subjected to it were due procedural protections in light of its "atypical and significant hardship"); *Brown v. Plata*, 563 U.S. 493, 504 (2011) (criticizing practice of holding mentally ill prisoners "for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services"); *see also Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring) (solitary "will bring you to the edge of madness, perhaps to madness itself"); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) ("it is well documented that … prolonged solitary confinement produces numerous deleterious harms"); *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer,

J., dissenting from denial of stay of execution) (solitary "raises serious constitutional questions"); *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (Oct. 9, 2018) (Sotomayor, J., respecting denial of certiorari) (recognizing "the clear constitutional problems raised by keeping prisoners … in what comes perilously close to a penal tomb").

In recent years, the circuit courts have also increasingly emphasized the science of solitary and subjected it to constitutional scrutiny. *E.g.*, *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (holding prolonged solitary violates Eighth Amendment, explaining that "Courts have [recently] taken note of th[e] extensive—and growing—body of literature" "establishing the risks and serious adverse psychological and emotional effects of prolonged solitary confinement"); *Williamson v. Stirling*, 912 F.3d 154, 184 (4th Cir. 2018) (holding defendants not entitled to qualified immunity after imposing isolation without process, explaining "our society has learned much about the physical and mental health impacts of solitary confinement"); *Wallace v. Baldwin*, 895 F.3d 481, 484-85 (7th Cir. 2018) (describing "negative psychological effects" of isolation, and holding that solitary subjected mentally ill prisoner to "imminent danger of serious bodily injury"); *Quintanilla v. Bryson*, 730 F. App'x 738, 740, 743-48 (11th Cir. 2018) (describing social isolation inherent to solitary confinement, holding that inflicting it without adequate procedure states due process and conditions claims); *Finley v. Huss*, 723 F. App'x 294, 297-99 (6th Cir. 2018) (holding that three-month solitary confinement

of mentally ill prisoner states Eighth Amendment claim); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (holding that solitary without process violates Fourteenth Amendment, explaining "[t]here is not a single study of solitary … last[ing] for longer than 10 days [that] failed to result in negative psychological effects"); *Palokovic v. Wetzel*, 854 F.3d 209, 225-26 (3d Cir. 2017) (holding that multiple 30-day solitary stints state Eighth Amendment claim, describing the "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation"); *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (reversing grant of summary judgment and denying qualified immunity because "horrors of solitary confinement" were sufficient to "chill a 'person of ordinary firmness' from complaining"); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (holding that prisoner had liberty interest in avoiding extended isolation, emphasizing that "[p]rolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized"). Together, these cases reflect a mature consensus that solitary is ripe for constitutional scrutiny.

This consensus is also reflected in prison reforms that have been instituted in a majority of states. *See* Maurice Chammah, *Stepping Down from Solitary*

Confinement, THE ATLANTIC, Jan. 7, 2016[7]; U.S. DOJ Final Report Concerning the Use of Restrictive Housing, at 72-78.[8] The picture is no different in the federal system. *See* U.S. GAO, Improvements Needed in Monitoring and Evaluation of Impact of Segregated Housing, at 61-65, May 2013.[9] U.S. DOJ Final Report, *supra*, at 104-20.

This Court is bound to consider this jurisprudential and societal evolution when considering whether the isolation of mentally ill prisoners comports with the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). The march of change is also relevant to Hamner's due process claim, which requires weighing the "hardship" of solitary confinement against ordinary prison life. Op.14-15 (Erickson, J., concurring); *see also Wilkinson*, 549 U.S. at 214, 223. Surely, the isolation that scientists and federal judges have concluded induces "madness" should not be considered "ordinary" in a civilized nation.

The time to "ignore" the "devastating impact [of] solitary confinement" has passed. Op.14-15 (Erickson, J., concurring). The panel believed itself constrained by prior precedent. Op.7-13. Hamner respectfully disagrees for the reasons set forth in his supplemental briefing. Nonetheless, this Court should now hold that the

[7] https://www.theatlantic.com/politics/archive/2016/01/solitary-confinement-reform/422565/.
[8] https://www.justice.gov/archives/dag/file/815551/download.
[9] http://www.gao.gov/assets/660/654349.pdf.

prolonged solitary confinement of mentally ill prisoners is an atypical and significant hardship that violates the Eighth and Fourteenth Amendments.

CONCLUSION

For the aforementioned reasons, this Court should grant en banc rehearing.

DATE: October 16, 2019

Respectfully submitted,

/s/ Daniel M. Greenfield

Daniel M. Greenfield*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL
OF LAW
375 East Chicago Ave.
Chicago, IL 60611
Telephone: 312-503-8538
daniel-greenfield@law.northwestern.edu

Attorney for Plaintiff-Appellant
Charles Hamner

* Northwestern Pritzker School of Law students Matthew Jimenez and Kristin Hendriksen contributed to the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel M. Greenfield
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 35(b)(2) because, excluding the parts of the document exempted by Fed. R. App. P 32(f), this document contains 3,792 words.

This document complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Microsoft Word 2016 and uses Times New Roman 14-point font.

In accordance with Circuit Rule 28A(h), I certify that this document has been scanned for viruses and is virus-free.

/s/ Daniel M. Greenfield
Attorney for Appellant